

Docket No. 152,748

The respondent, a self-insured, requests review of the Award of Administrative Law Judge Nelsonna Potts Barnes entered in this proceeding on June 3, 1994.

Claimant appeared by her attorney, Andrew E. Busch of Wichita, Kansas. The respondent appeared by its attorney, Curtis M. Irby of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, William L. Mitchell of Hutchinson, Kansas.

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge awarded claimant benefits based upon a thirty-four percent (34%) functional impairment rating. Also, the Administrative Law Judge denied respondent's request to assess liability against the Workers' Compensation Fund. The respondent requested a review of those findings. The issues now before the Appeals Board are nature and extent of injury and disability and the liability of the Workers' Compensation Fund, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified to award claimant benefits based upon an impairment of function rating of twenty-four percent (24%). The finding of the Administrative Law Judge absolving the Fund of liability should be affirmed.

(1) Claimant began working for the respondent in 1981. Over a period of years, claimant developed overuse syndrome in both upper extremities as a result of the repetitive motion required in her work. In July 1989, claimant sought treatment from her family physician who diagnosed carpal tunnel syndrome and referred her to orthopedic surgeon J. Stanley Jones, M.D. Dr. Jones initially prescribed medications and wrist splints, but did not restrict claimant's work activities. In October 1989, when claimant took off work for pregnancy leave, her symptoms resolved. However, claimant's symptoms recurred when she returned to work in January of 1990.

Claimant took a second pregnancy leave from April to September 1990. Once again her symptoms resolved while she was off work. Again, after returning to work, her symptoms recurred. In January 1991, claimant sought additional treatment from Dr. Jones because her symptoms were worsening. This time, Dr. Jones placed restrictions on her activities. Dr. Jones treated claimant through 1991 and in December of that year obtained a second opinion from another orthopedist who recommended surgery to release the carpal tunnels.

Claimant testified at her regular hearing in February 1992 that she declined to undergo surgery. However, after the hearing, claimant's condition did not improve and claimant underwent carpal tunnel release surgery in June and July 1992. After physical therapy and work hardening, claimant returned to work for respondent in October 1992. Despite her attempts to follow Dr. Jones' restrictions, claimant's condition did not improve. Claimant saw Dr. Jones in March 1993 and was again taken off work.

Because claimant has not testified since the regular hearing in February 1992, we are somewhat unenlightened regarding the events occurring after that date.

The Administrative Law Judge found claimant entitled to permanent partial benefits based upon a thirty-four percent (34%) functional impairment rating. The Administrative Law Judge adopted the rating of Dr. Schlachter who evaluated claimant for a second time on March 18, 1993 and diagnosed overuse syndrome and tendinitis of both shoulder girdles, entrapment neuropathy of the ulnar nerve at the elbow bilaterally, and failed carpal tunnel syndrome surgery. Dr. Schlachter believes claimant should observe permanent

restrictions of no repetitive pushing, pulling, twisting, or grasping with either hand; no working above the horizontal with either hand or arm; no lifting greater than ten (10) pounds on a repetitive basis or fifteen (15) pounds at any time with either hand or arm; and should avoid cold environments and vibratory tools.

The only other expert medical testimony and opinion presented was that of the treating physician, J. Stanley Jones, M.D. Dr. Jones believes claimant, post-surgery, has a twelve percent (12%) permanent partial impairment of function to both upper extremities. A review of the AMA Guides indicates Dr. Jones' rating to the upper extremities would convert to a fourteen percent (14%) impairment to the body as a whole.

For purposes of computation of this Award, the Appeals Board utilizes June 1, 1992, as the date of accident, because that is the day before claimant underwent her first surgery, a carpal tunnel release on her right hand. In this proceeding it is difficult to select an accident date because of the numerous occasions claimant left and returned to work, and the history of medical treatment that was provided. It should be noted claimant filed her application for hearing, Form E-1, in February 1991 alleging a date of accident of September 1990 and each workday thereafter. As hindsight now indicates, claimant's problems progressed from the time the E-1 was filed to the point claimant ultimately required surgery.

Because of the accident date chosen and because claimant has sustained a "nonscheduled" injury, claimant is entitled permanent partial general disability benefits under the provisions of K.S.A. 1991 Supp. 44-510e. The statute provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Because claimant returned to work after her surgeries to accommodated employment earning a comparable wage, claimant does not argue that the presumption of no work disability contained in the statute set forth above does not apply. Claimant contends the finding of the Administrative Law Judge should be affirmed. On the other hand, respondent contends the Award should be lowered because the Administrative Law Judge failed to consider the opinions of Dr. Jones. Because there is no compelling reason to give one doctor's opinion greater weight than the other, the Appeals Board finds the ratings of Doctors' Jones and Schlachter should be averaged and, therefore, finds claimant has experienced a twenty-four percent (24%) functional impairment as a result of the injuries she sustained while working for the respondent. Further, as the evidence indicates the respondent provided accommodated employment to the claimant after her return to work from the surgeries, the Appeals Board finds the presumption of no work disability is applicable at this time.

(2) The analysis and finding of the Administrative Law Judge is correct regarding the liability of the Workers Compensation Fund. K.S.A. 1992 Supp. 44-567 addresses the apportionment of liability between the respondent and Workers Compensation Fund. Subsection (a) of the statute provides:

"An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to apportionment of the costs thereof as follows:

(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.

(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund."

Under this statute, the respondent must prove a preexisting impairment caused or contributed to the resulting disability or injury. As found by the Administrative Law Judge, the medical evidence fails to establish the relationship between any preexisting impairment and the resulting disability or injury. When asked the critical questions concerning fund liability, both doctors indirectly answered the question and stated that claimant's condition worsened when she returned to work. Rather than proving the required relationship between the preexisting impairment and resulting disability or injury, these questions and answers proved the relationship between the injury and work activities, an entirely different issue. Therefore, respondent has failed to establish its case against the Workers' Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes entered in this proceeding on June 3, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Marinda Lynn Chavez, and against

the respondent, Southwestern Bell Telephone Company, a the insurance carrier, Southwestern Bell Self-Insurance Fund, for an accidental injury which occurred on June 1, 1992 and based upon an average weekly wage of \$455.50, for 21 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$6,069.00, followed by 394 weeks of permanent partial disability benefits at the rate of \$72.88 per week or \$28,714.72 for a 24% permanent partial general disability, making a total award of \$34,783.72.

As of June 23, 1995, there is due and owing claimant 21 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$6,069.00, followed by 138.57 weeks of permanent partial disability compensation at the rate of \$72.88 per week in the sum of \$11,629.46, for a total of \$17,698.46 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$17,085.26 is to be paid for 255.43 weeks at the rate of \$72.88 per week, until fully paid or further order of the Director.

The Workers' Compensation Fund is absolved of all liability in this proceeding.

The remaining Orders of the Administrative Law Judge that are not inconsistent with those set forth herein are hereby adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of June, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Wichita, Kansas
Curtis M. Irby, Wichita, Kansas
Randall Henry, Hutchinson, Kansas
Nelsonna Potts Barnes, Administrative Law Judge
George Gomez, Director